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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-3841

THE STATE OF OKLAHOMA and PARK J. ANDERSON,
Warden, Oklahoma State Penitentiary,
Petitioners,

VERSUS

HOWARD E. MASON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October, 1974

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In the
Supreme Court of the United States
OCTOBER TERM, 1974

No. .....

THE STATE OF OKLAHOMA and PARK J. ANDERSON,
Warden, Oklahoma State Penitentiary,
Petitioners,

VERSUS

HOWARD E. MASON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Comes now the Attorney General of the State of Oklahoma on behalf of the petitioners, the State of Oklahoma and Park J. Anderson, and respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in the proceeding on August 27, 1974.

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Tenth Circuit is unpublished. The opinion was rendered on the 27th day of August, 1974 (Appendix A).

The opinion of the United States District Court for the Western District of Oklahoma appears at 357 F.Supp. 672 (Appendix B).

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on the 24th day of January, 1974. A petition for rehearing was timely filed by the petitioners herein. Rehearing was granted. On the 27th day of August, 1974, the Court of Appeals entered the opinion which is now presented for review. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S. 1254(1).

QUESTIONS PRESENTED

1. Does a federal court have habeas corpus jurisdiction over a state prisoner's petition wherein the conviction being challenged has been fully served and, the prior conviction has no positive relationship to the present confinement so that invalidation of the prior conviction would terminate or shorten the length of confinement under the subsequent conviction?

2. Does a plea of guilty to an habitual offender-enhancement charge, *i.e.*, Burglary in the Second Degree, After Former Conviction of a Felony, waive all challenges to the validity, admissibility or use of these prior convictions used to enhance punishment.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28: Section 2254(a) State Custody; Remedies in Federal Courts.

The Supreme Court, a justice thereof, a Circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On February 10, 1965, Howard E. Mason, hereinafter referred to as respondent, was convicted upon pleas of guilty of the crimes of Forgery in the Second Degree (Case No. 29268) and Possession of Narcotics (Case No. 30076). Respondent was sentenced to two five-year terms of imprisonment, the sentences to run concurrently. On December 15, 1967, respondent completed service of the sentences and was discharged from the custody of the State.

In 1970, respondent was convicted upon pleas of guilty of the crimes Burglary in the Second Degree, After Former Conviction of a Felony (Case No. CRF-69-2754) and Obtaining a Thing of Value by Bogus Check, After Former Conviction of a Felony (Case No. CRF-69-2832). Respondent was sentenced to 15 years imprisonment in each case, the terms to run concurrently. Respondent is presently incarcerated in the Oklahoma State Penitentiary pursuant to those convictions.

Respondent did not appeal the 1970 convictions nor did respondent seek any collateral review of those convictions.

The 1965 convictions were collaterally attacked pursuant to the Oklahoma Post Conviction Procedures Act, 22 O.S. §§1080, *et seq.* The petitions for post conviction relief were denied by the state district court. An appeal of the denial of post conviction relief was perfected to the Oklahoma Court of Criminal Appeals, Case No. A-17,413. That Court affirmed the lower court's decision.

On the 31st day of August, 1972, respondent filed a petition for writ of habeas corpus in the United States District Court for the Western District of Oklahoma, Case No. 72-175. Respondent alleged that the 1965 convictions were void and that those void convictions were used to enhance punishment in the 1970 convictions. Respondent sought relief through a court order which would credit the time served on his allegedly void convictions to the present sentences. On the 29th day of March, 1973, the District Court entered an order dismissing the petitions for habeas corpus. The Court stated that the convictions under attack (the 1965 convictions) did not bear a positive relation to the present confinement so that if the prior convictions were invalidated, the present confinement would be shortened or terminated. The Court further held that the applicant was not "in custody" within the statutory requirement set forth in 28 U.S.C. §2254.

An appeal of that order was perfected to the United States Court of Appeals for the Tenth Circuit (Case No. 73-1331). On January 24, 1974, that Court issued its order vacating the judgment of the District Court and remanding the cause for further consideration. A petition for rehearing was granted on March 8, 1974. After further briefing and

oral argument, the Court of Appeals entered its order on August 27, 1974. The Court remanded the cause with instructions that the District Court determine the validity of the 1965 convictions and the effect, if any, that the 1970 pleas of guilty had in constituting a waiver to the challenges against the 1965 conviction. The petition for writ of certiorari was filed within 90 days of the date of the Court of Appeals' order.

STATEMENT OF FACTS

In 1969, respondent was charged by Information with Burglary in the Second Degree, After Former Conviction of a Felony and Obtaining a Thing of Value by Bogus Check, After Former Conviction of a Felony. To the two informations, respondent entered pleas of guilty. By alleging that respondent was an habitual offender, punishment was enhanced under the provisions of the habitual offenders statute, 21 O.S. §51. The 1965 convictions were alleged in the Information as prior convictions.

REASONS FOR GRANTING THE WRIT

PROPOSITION I

FEDERAL HABEAS COURTS DO NOT HAVE JURISDICTION TO ENTERTAIN CHALLENGES TO CONVICTIONS WHICH HAVE BEEN FULLY SERVED.

The *sine qua non* of federal habeas corpus jurisdiction over a state prisoner's application is that the petitioner be a "persor in custody" pursuant to the judgment of a state court. Title 28 U.S.C. §2254.

Admittedly, the concept of "in custody" has been expanded in recognition of the fact that remaining disabilities and burdens could emanate from the conviction. Thus a case would not be moot inasmuch as an applicant could have a substantial stake in a judgment of conviction which would survive the satisfaction of the sentence. *Peyton* v. *Rowe*, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968); *Carafas* v. *LaVallee*, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968). However, it is respectfully submitted that federal courts may not assume habeas jurisdiction under 28 U.S.C. §2254 when the sentence under attack has been fully served and, the applicant has been released prior to the filing of any collateral challenge in a federal court.

In the case at bar, the judgments and sentences being challenged were satisfied five years (5) prior to the filing of any collateral proceeding in either the state or federal courts. The validity of these convictions standing alone cannot be the subject of a federal inquiry under 28 U.S.C. §2254. The validity of a conviction which has been fully served may be considered only if the applicant can show that his present confinement or "custody" has a positive relation to that prior conviction so that invalidation of the prior conviction would affect the present confinement.

In construing the *pro se* petition with liberality, the Court of Appeals for the Tenth Circuit concluded that the applicant was in fact challenging the present recidivist conviction. The Court stated that the issue to be considered was the use of allegedly invalid prior convictions to enhance the subsequent convictions. The Court concluded that

the validity of the 1965 convictions was a proper subject of inquiry.

The Court of Appeals has apparently expanded the concept of "in custody" to allow a federal habeas court to exercise jurisdiction over any state conviction, regardless of the fact that the judgment and sentence being challenged has been fully served, if that conviction was used to enhance punishment in a subsequent conviction. The Court has seemingly adopted the theory that if the applicant is in custody pursuant to that subsequent conviction, the statutory requirement set forth in 28 U.S.C. §2254 is fulfilled. This decision is contrary to numerous decisions rendered by other circuit courts. Courts of Appeals for the Second, Third, Fourth, and Fifth Circuits have held that the "in custody" requirement is met only when the applicant challenges a prior conviction which has some positive relation to present confinement to the extent that if the prior conviction is invalidated, the applicant's present confinement would be shortened or terminated. See *United States, ex rel. Myers* v. *Smith,* 444 F.2d 75 (2nd Cir. 1971); *Lyons* v. *Brierley,* 435 F.2d 1214 (3rd Cir. 1970); *Brown* v. *United States,* 483 F.2d 116 (4th Cir. 1973); *Cappetta* v. *Wainwright,* 406 F.2d 1238 (5th Cir. 1968), *cert. den.* 396 U.S. 846, 90 S.Ct. 55, 24 L.Ed.2d 96 (1969).

Petitioners submit that without a showing that there is the relation between the prior and subsequent convictions, the federal court should not undertake an inquiry solely on the issue of the validity of that prior conviction.

PROPOSITION II

FEDERAL HABEAS CORPUS JURISDICTION DOES NOT EXTEND TO A PRIOR CONVICTION FULLY SERVED UNLESS THERE IS A POSITIVE RELATION BETWEEN THE PRIOR AND SUBSEQUENT CONVICTIONS SO THAT INVALIDATION OF THE PRIOR CONVICTION WOULD TERMINATE OR SHORTEN THE LENGTH OF THE PRESENT CONFINEMENT.

In the August, 1974 order the Court of Appeals remanded the cause and directed the District Court to determine (1) the validity of the 1965 convictions and (2) the effect the 1970 pleas of guilty would have in constituting a waiver to challenges of the prior convictions. Petitioners submit that the federal court does not have jurisdiction to inquire into the validity of the 1965 convictions unless there is an initial determination made as to the effect that the 1970 pleas of guilty have regarding challenges to the 1965 convictions.

The District Court made such an initial determination prior to the appeal to the Tenth Circuit. The District Court held that the prior convictions bore no positive relation to the present confinement so that if the prior convictions were invalidated the present confinement would be shortened or terminated. The Court of Appeals failed to adopt this finding although the proposition was re-urged at the time of rehearing. By failing to accept the District Court's determination of this question, the Court of Appeals has in effect held that a federal habeas court has jurisdiction to inquire into the validity of a completed prior conviction without first determining the effect its invalidation would have on the present confinement. It is with this holding

that petitioners strongly disagree. It is petitioners' contention that federal habeas jurisdiction extends to a review of prior convictions only if their invalidation would affect present confinement in a positive manner.

PROPOSITION III

THE APPLICATION FOR WRIT OF HABEAS CORPUS SHOULD HAVE BEEN DISMISSED BECAUSE PLAINTIFF HAD NOT EXHAUSTED STATE REMEDIES.

The Court of Appeals has disregarded the respondent's statement that the validity of the 1970 pleas of guilty are not being challenged. The Court maintained that the basic assertion in the habeas petition "*is* that the second sentences, predicated upon enhancement by reason of the prior 1965 convictions, are invalid because those convictions and guilty pleas were tainted by lack of counsel at the time of sentencing and for want of free, voluntary and uncoerced guilty pleas." Thus, the Court is entertaining a petition for writ of habeas corpus which challenges the recidivist sentences rendered in 1970. In reality, if the respondent was successful on the merits of the case, the Court would not be invalidating the earlier state conviction, but validating the recidivist conviction itself because the latter rested on evidence constitutionally invalid, *i.e.*, a prior state conviction which is void under *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

However, petitioner submits that the Court of Appeals has failed to require the respondent to exhaust available state remedies. The respondent has never challenged the validity of the 1970 convictions in the state courts. The

Court of Appeals has failed to follow the statutory mandate of 28 U.S.C. §2254(b) wherein it is stated:

> "An application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

In this case, the applicant has never challenged the 1970 convictions in the courts of the State of Oklahoma. Title 22 O.S. §§1080, *et seq.*, the Post Conviction Procedures Act, is an available state remedy which has not been exhausted.

PROPOSITION IV

INVALIDATION OF THE 1965 CONVICTIONS WOULD NOT AFFECT THE LENGTH OF PRESENT CONFINEMENT.

In this case, the initial issue which should be determined by the federal habeas court is whether the relation between the present confinement and the prior conviction is such that an invalidation of the prior conviction would result in a modification or termination of the present confinement. If the Court finds in the affirmative, then and only then may the Court proceed to the merits regarding the validity of the prior convictions. In the present case, the District Court made three separate findings after making this initial inquiry. The Court held that the convictions under attack bore no positive relation to the present confinement in that an invalidation of the prior con-

victions would not affect the present confinement. The Court also held that the applicant was not in custody pursuant to the convictions being challenged. Lastly, the Court stated that the application for habeas relief was not filed during the time applicant was "in custody" pursuant to the 1965 convictions. Petitioners submit that the Court's findings were proper, and therefore, no further inquiry was warranted.

The Court's initial determination was based upon the fact that the convictions rendered in 1970 were premised upon unchallenged pleas of guilty. In 1970, the respondent entered pleas of guilty to enhancement charges of Burglary in the Second Degree, After Former Conviction of a Felony, and Obtaining a Thing of Value by Bogus Check, After Former Conviction of a Felony. The admissions of guilt to these criminal charges and the admissions to the charge of habitual offender, formed a functional equivalent of pleas of guilty to independent criminal charges. The validity of those guilty pleas was not challenged in the application for habeas relief. In fact, the validity of those pleas has never been questioned in either the state or the federal courts.

Courts of Appeals for the Fifth and Ninth Circuits have held that a valid plea of guilty to an habitual offender-enhancement charge is a waiver of any complaints concerning those prior convictions set out in the enhancement charge. See *Zales* v. *Henderson*, 403 F.2d 320 (5th Cir. 1970); *Price* v. *Beto*, 436 F.2d 1070 (5th Cir. 1971); *Wright* v. *Craven*, 461 F.2d 1109 (9th Cir. 1972).

Petitioners respectfully submit that by entering pleas of guilty, respondent admitted all allegations contained in the Informations and waived all challenges to the validity, admissibility or use of those prior convictions.

Petitioners, therefore, respectfully submit that the District Court correctly held that the invalidation of the 1965 convictions would not affect the validity of the recidivist convictions obtained in 1970. Because there was no positive relation between the prior convictions and subsequent convictions which would affect present confinement, the Court correctly refused to make further inquiry into the validity of the 1965 convictions. Petitioners respectfully submit that the Court of Appeals for the Tenth Circuit erred by reversing the District Court's decision and remanding the cause with instructions to determine the validity of the 1965 conviction. The Court of Appeals further erred by failing to address the controlling question of law, to-wit: Do pleas of guilty to an habitual offender-enhancement charge waive challenges to the validity of the prior convictions used to enhance punishment?

CONCLUSION

For all of the above reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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October, 1974

APPENDIX A

FILED
AUG 27 1974
Howard K. Phillips
Clerk, United States
Court of Appeals
Tenth Circuit

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 72-1331

HOWARD E. MASON,	)	
	)	
Petitioner-Appellant,	)	Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. 72-769)
	)	
vs.	)	
	)	
PARK J. ANDERSON, Warden, Oklahoma State Penitentiary,	)	
	)	
	)	
Respondent-Appellee.	)	

W. Robert Montgomery, Lakewood, Colorado, for Appellant.

Kay Karen Kennedy, Assistant Attorney General, Oklahoma City, Oklahoma (Larry Derryberry, Attorney General of Oklahoma, Oklahoma City, Oklahoma, on the brief) for Appellee.

Before PICKETT, HILL and BARRETT, Circuit Judges.

[APPENDIX]

PER CURIAM.

This matter is before us for the second time in a little over six months pursuant to an order granting a petition for rehearing in a federal habeas corpus proceeding by Mason, a prisoner of the State of Oklahoma.

Mason pleaded guilty in 1965 in State of Oklahoma cases No. 29268 charging second degree forgery, and No. 30076 charging illegal possession of narcotics. He was sentenced to concurrent five-year terms of imprisonment and was released on parole on December 15, 1967.

On January 26, 1970, Mason pleaded guilty in Oklahoma state court proceeding No. CRF-69-2754, to charges of burglary in the second degree after former conviction of a felony (AFCF), and in case No. CFR-69-2832 to charges of obtaining a thing of value by bogus check AFCF. Although Mason was subject, by statute, to a prison sentence of not less than two nor more than seven years for each of these convictions, he was sentenced to fifteen years imprisonment in each case, said sentences to run concurrent, under Oklahoma's habitual-offender enhancement statute.

On March 8, 1972, Mason sought State post conviction relief to overturn the 1965 convictions. He alleged, inter alia, that he was without counsel at the time he entered his pleas; that the District Court did not advise him of his rights before accepting his pleas; that the District Court failed to ascertain that the pleas were voluntary and knowing; and that the pleas were involuntary, having been coerced by threats. In dismissing Mason's post conviction application the State District Court found:

> This man, with counsel of his own choice, voluntarily entered pleas of guilty to both charges. . . .
>
> This defendant has not been deprived of any constitutional or statutory rights.

The order of the District Court was affirmed by the Oklahoma State Court of Criminal Appeals on June 19, 1972. That Court noted that Mason had then exhausted all of his available state remedies.

On August 31, 1972, Mason brought this habeas corpus action in the United States District Court challenging his 1965 convictions essentially on the ground that he was without counsel at the time he entered his pleas of guilty to the 1965 charges and that such pleas were not freely and voluntarily entered by him. Mason, in his "Memorandum Brief in Support of Petition for Writ of Habeas Corpus", stated that "[T]he present judgment and sentence is not under attack in this action." In his traverse he reiterated this contention and stated that he did not "ask [the District] Court to in any way modify his present sentence, only to apply time served on an illegal sentence [for the prior 1965 convictions] to his present sentence. . . ."

It is nevertheless clear that his basic assertion *is* that the second sentences, predicated upon enhancement by reason of the prior 1965 convictions, are invalid because those convictions and guilty pleas were tainted by lack of counsel at the time of sentencing and for want of free, voluntary and uncoerced guilty pleas. He did contend, and does now contend, that had the prior 1965 convictions not been used to enhance punishment in the second convictions, he would, under Oklahoma law, have been subject to a sentence of from two to seven years rather than the one to ten years to life under which he is presently incarcerated.

By way of affidavit, the court reporter who was present at the 1965 plea hearings, at which time Mason entered the two guilty pleas, stated that "no notes were taken at the time of the guilty pleas, and, therefore, there are no notes available for transcription."

In our prior opinion we expressed no opinion on the merits of Mason's contentions. However, we directed the

District Court to undertake an evidentiary hearing to determine the validity of the 1965 convictions. Prior to the evidentiary hearing on remand, appellee, State of Oklahoma, petitioned this Court for a rehearing, contending:

1. In the opinion rendered on the 24th day of January, 1974, this court declined to consider the effect of the 1970 pleas of guilty on the 1965 convictions. Appellees respectfully submit that this issue is critical to the decision of the case.

Rehearing was granted. We re-affirm our prior holding that the Trial Court erred in ruling that Mason was not "in custody" for purposes of jurisdiction required under 28 U.S.C.A. § 2254. *See* Hensley v. Municipal Court, 411 U.S. 345 (1973); Peyton v. Rowe, 391 U.S. 54 (1968); Oswald v. Crouse, 420 F.2d 373 (10th Cir. 1969).

We now remand with instructions that the District Court determine: (1) the validity of the 1965 convictions, in light of Mason's allegations that he entered the guilty pleas without counsel, that the pleas were involuntary in that he was not advised of his rights or the effect and consequences of the guilty pleas, and that the pleas were coerced by threats; and (2) what effect, if any, Mason's 1970 guilty pleas had in constituting waiver on his part in relation to any attacks which may have been available to him against the 1965 convictions which gave rise to the implementation of the Oklahoma habitual-offender enhancement charges.

The cause is remanded for further proceedings determinative of the issues presented herein, in accordance with the provisions of 28 U.S.C.A. § 2254.

—v—

APPENDIX B [APPENDIX]

FILED
MAR 29 1973
Rex B. Hawks
Clerk, U. S. District Court
By Zeta M. Cowan
Deputy

RECEIVED
MAR 30 1973
Attorney General
of Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

HOWARD E. MASON,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. CIV-72-769
	)	
PARK J. ANDERSON, WARDEN,	)	
	)	
Respondent.	)	

ORDER

The court having examined the files and records in this proceeding together with the Second Report of the United States Magistrate and being fully advised in the premises, finds:

1. This is a petition for a writ of habeas corpus by a state prisoner who challenges the validity of the judgments and sentences of the District Court of Oklahoma County, in Cases Numbered 29268 and 30076. On February 10, 1965, after pleas of guilty in each case, the petitioner received

concurrent five year terms of imprisonment. The imprisonment was served and petitioner discharged from custody on December 15, 1967.

2. The petitioner is in confinement in the Oklahoma State Penitentiary at McAlester, Oklahoma, pursuant to judgments and sentences of the District Court of Oklahoma County in Cases Numbered CRF-69-2754 and CRF-69-2832. On January 26, 1970, in Case No. CRF-69-2754 petitioner plead guilty to the charge of burglary in the second degree after former conviction of a felony, and in Case No. CRF-69-2832 plead guilty to the charge of obtaining a thing of value by a bogus check after former conviction of a felony. A sentence of 15 years imprisonment was imposed in each case, the sentences to run concurrently.

3. The convictions now under attack bear no positive relation to petitioner's present confinement so that if they were invalidated petitioner's present confinement would be shortened or terminated.

4. The petitioner was not "in custody" pursuant to the court's judgments and sentences which are challenged by this proceeding when the petition was filed.

5. This court does not have jurisdiction to proceed since the federal habeas corpus statute requires that the petitioner be "in custody" when the application for habeas corpus is filed.

IT IS THEREFORE ORDERED:

1. The Petition for Writ of Habeas Corpus is dismissed;

2. That a copy of this Order be mailed by the clerk of this court to the petitioner together with a copy of the Second Report of the United States Magistrate;

3. That the clerk of this court furnish to the respondent a copy of this Order together with a copy of the Second

Report of the United States Magistrate by mailing the same to the Attorney General of the State of Oklahoma.

Dated this 29 day of March, 1973.

s/ Luther B. Eubanks

UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON

March 29, 1973

ADELAIDE HOLSTON, DEPUTY

FILED
MAR 29 1973
Rex B. Hawks
Clerk, U. S. District Court
By Zeta M. Cowan
Deputy

RECEIVED
MAR 30 1973
Attorney General
of Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

HOWARD E. MASON,)
)
Petitioner,)
)
v.) No. CIV-72-769
)
PARK J. ANDERSON, WARDEN,)
)
Respondent.)

SECOND REPORT OF THE UNITED STATES MAGISTRATE

The undersigned having examined the files and records in this proceeding submits the following report:

I. NATURE OF PROCEEDING

This is a petition for a writ of habeas corpus by a state prisoner in which he challenges the validity of the judgments and sentences of the District Court of Oklahoma County, in Cases Numbered 29268 and 30076, wherein on February 10, 1965, he received two concurrent five year terms of imprisonment which have already been served and the petitioner discharged on December 15, 1967.

II. ALLEGED GROUNDS FOR VOIDING THE JUDGMENTS AND SENTENCES IN SAID CASES NUMBERED 29268 and 30076

1. Petitioner was not advised of his right to appeal the guilty pleas and when he filed an application for post conviction relief he was denied a Casemade at public expense.

2. Petitioner was without counsel at the time he entered his pleas of guilty.

3. The district court failed to advise petitioner of his rights and through his pleas of guilty, he waived such rights, before accepting his pleas.

4. The district court failed to first ascertain and place on the record that defendant's pleas of guilty were voluntary and made with full understanding of the nature of the facts in relation to the charges before accepting the pleas of guilty.

5. The district court failed to determine if there was a factual basis for the defendant's pleas of guilty before accepting his pleas.

6. The petitioner's pleas of guilty were involuntary because he was coerced by threats and the state failed to keep the plea bargain made with him.

III. FINDINGS OF FACT

On February 10, 1965, petitioner entered pleas of guilty to the charge of forgery in second degree in Case No. 29268 and to the charge of illegal possession of narcotics in Case No. 30076. The court sentenced the petitioner to terms of five years imprisonment in each case to run concurrently. The petitioner completed service of these sentences and was discharged from custody December 15, 1967.

2. The petitioner is confined in the Oklahoma State Penitentiary at McAlester, Oklahoma, by virtue of judgments and sentences of the District Court of Oklahoma County in Cases Numbered CRF-69-2754 and CRF-69-2832. On January 26, 1970, the petitioner plead guilty in Case No. CRF-69-2754 to the charge of burglary in the second degree after former conviction of a felony and in Case No. CRF-69-2832 to the charge of obtaining a thing of value by bogus check after former conviction of a felony. In each of these cases, the court imposed a sentence of 15 years imprisonment to run concurrently. Petitioner does not in this proceeding challenge the judgments and sentences in these two cases (see petitioner's "Traverse").

3. No direct appeal of the judgments and sentences in Cases Numbered 29268 and 30076 was taken.

4. An application for post conviction relief in Cases Numbered 29268 and 30076 was filed in the sentencing court. The Attorney General advises that the allegations contained therein were similar to ones now urged in this court. The District Court of Oklahoma County denied the relief sought without an evidentiary hearing on March 24, 1972.

5. An appeal by the petitioner to the Court of Criminal Appeals from the Order denying post conviction relief was unsuccessful in Case No. A-17,413.

IV. CONCLUSIONS OF LAW

The threshhold question in this proceeding is whether this court has jurisdiction to entertain this petition. Admittedly, the petitioner on December 15, 1967, completed the sentences imposed pursuant to the convictions which he now denounces. His present detention is under the sentences received by him in 1970. In *Ward* v. *State of Oklahoma*, 376 F.2d 847 (CA10 1967) our court of appeals held:

> "Habeas corpus is available only to a prisoner who is in custody pursuant to the court judgment which is challenged by the proceeding."

This case would appear to foreclose to the petitioner habeas relief in this proceeding. Its continued vitality, however, has not been reviewed by the court since the decision of the Supreme Court in *Carafas* v. *Le Vallee*, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 rendered May 20, 1968. Therein the petitioner sought habeas corpus *before* his sentence expired but his application was not finally adjudicated until *after* his sentence expired and he was unconditionally released from custody. On those facts the court held that the case was not moot and that jurisdiction over the *timely* brought petition had not been terminated by petitioner's release:

> ". . . once the federal jurisdiction has attached in the district court, it is not defeated by the release of the petitioner prior to completion of proceedings on such application." 404 U.S. at 238.

The court emphasized that the petitioner was in custody when he filed his application and affirmed:

> "The federal habeas corpus statute requires that the applicant must be 'in custody' when the application for habeas corpus is filed. This is required not only by the repeated references in the statute, but also by the history of the great writ." 404 U.S. at 238.

In short, the court merely ruled that mootness, resulting from the delay in the appellate process, would not prevent habeas corpus relief. It did not hold that a habeas corpus petition could be instituted when the petitioner was not in custody. *United States* v. *Meyer,* 417 F.2d 1020 n.2 (CA8 1968). It has been observed by the editors in Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1077 (1970):

> "[in] deciding the case as it did, the court gave several indications that it was consciously eschewing its opportunity to extend the custody concept to include petitioner's disabilities. First, by refusing to consider the collateral restraints themselves a custody, Carafas results in an apparent, arbitrary distinction. The negative pregnant of the not-moot holding is that habeas relief is not available to those who apply for the writ after their release, even though they may be subject to the same disabilities which the Court saw as sufficient to warrant a remedy in Carafas . . . Second, the court twisted the statutory language to reach even this limited result. The statute specifies that '[t]he writ . . . shall not extend to a prisoner unless . . . [h]e is in custody. . . .' Although the writ had not issued prior to Carafas' release, the court held jurisdiction had attached, since the statute requires only 'that the applicant must be "in custody" when the application for habeas corpus is filed.' . . ."

Nevertheless, the trend in the courts has been to treat Carafas as relaxing the "in custody" requirement imposed on applicants for habeas corpus. In *Capetta* v. *Wainwright,* 406

F.2d 1238 (CA5 1969) the court sustained habeas corpus jurisdiction where the petitioner had already served the sentence he was attacking but was "in custody" for another offense on a separate sentence which was not being attacked and claimed that if he should prevail on the merits of his petition he would under Florida law be entitled to credit in some degree on the sentence which he was then serving. In *Lyons* v. *Brierley*, 435 F.2d 1214 (CA3 1970) the court found jurisdiction to consider a habeas corpus attack on the validity of a fully served sentence petitioner was required to complete which thereby postponed the commencement of a later sentence on another unchallenged conviction for which the petitioner was still incarcerated. cf. *United States, ex rel Myers* v. *Smith*, 445 F.2d 75 (CA2 1971) (court had no jurisdiction where petitioner serving an unrelated sentence attacks an earlier conviction which had been fully served and the petitioner released and the petitioner did not allege that the prior conviction had affected his present detention) and *United States ex rel Collins* v. *Cady*, 322 F. Supp. 1168 (E.D. Wisc. 1971) (court had no jurisdiction where petitioners convicted of misdemeanor had already served their sentences and were in custody under convictions which could in no way be linked or attributable to the conviction under attack).

In the light of these cases it would appear that this court has jurisdiction if the convictions now under attack bear some positive relation to petitioner's present confinement so that if they are invalidated the petitioner's present confinement would be shortened or terminated. First, such a relationship would exist if we were to find, as petitioner insists we should, that he would be entitled to apply the time served under any such void conviction to his present sentences. This must be determined in accordance with the Oklahoma law. *Handley* v. *Page*, 279 F.Supp. 878 (W.D. Okla. 1968), affirmed 398 F.2d 351 (CA10 1968), cert. denied 394 U.S. 935; *Johnson* v. *Beto*, 383 F.2d 197 (CA5 1967);

Burns v. *Crouse*, 339 F.2d 883 (CA10 1964), cert. denied 380 U.S. 925, 13 L.Ed.2d 811. See also *Newell* v. *Page*, 280 F. Supp. 203 (W.D.Okla. 1968); *Howard* v. *Craven*, 306 F. Supp. 730 (C.D.Cal. 1969); *Gross* v. *Sarver*, 307 F.Supp. 1105 (E.D.Ark. 1970). The rule in Oklahoma is set forth in Syllabus No. 1 of *Martin* v. *Page*, 484 P.2d 1319, 1320 (Okla. Cr. 1971):

> "Prison time served under a voided conviction will not be credited upon a sentence incurred for an entirely different offense subsequent to release from prison on the voided sentence."

Clearly under this rule, the petitioner would not be entitled to credit upon his present sentences if the challenged convictions were voided since the current sentences were incurred after the petitioner had completed the questioned sentences and been released from prison. Petitioner's reliance upon *Lamb* v. *Page*, 482 P.2d 615 (Okla.Cr. 1971) is misplaced for the distinction recognized in the Martin case applies also to this petitioner:

> "Petitioner cites Lamb v. Page, Okla.Cr., 482 P.2d 615 (1971), as authority for his position. However, Lamb is distinguishable from the instant case in that Lamb was at the penitentiary under more than one sentence. Lamb was initially booked in under the sentence we later held to be void. As a matter of fairness in that particular situation, this court allowed time served under the voided sentence to apply toward fulfillment of existing sentences Lamb 'may now be serving.' For if not booked in on the voided sentence, Lamb would have been serving the other sentences." 484 P.2d at 1321.

Similarly, the case of *Goodwin* v. *Page*, 296 F.Supp. 1205 (E.D.Okla. 1969) urged by petitioner as authority that he would receive credit if his old convictions were voided is distinguishable on its facts from petitioner's circumstances.

There petitioner was incarcerated under a life sentence imposed in 1936. In 1961 he had been paroled under this sentence and while on parole committed an offense for which he received a five year sentence in 1963. His parole was also revoked and he was returned to the penitentiary on April 30, 1963, under his original sentence. In the habeas corpus proceeding the original life sentence was declared void and since the petitioner had already served five years subsequent to the revocation of his parole this time was credited against the valid sentence. The commencement of petitioner's custody under the subsequent valid sentence was delayed by the revocation of his parole on the original invalid sentence and the court therefore ordered his release since his sentence under the valid conviction would have been served but for his incarceration under the invalid sentence. If the petitioner could successfully void his prior convictions Oklahoma law nevertheless would preclude the application of the time served under these sentences to reduce the amount of time he is required to serve under his present incarceration.

The necessary relationship between petitioner's present confinement and the prior convictions might however be demonstrated if the invalidation of the former convictions would necessarily render void the present sentences of the petitioner under the Oklahoma Subsequent Offender Statute. It does not appear, however, that such a result would follow from petitioner's success in this proceeding. Petitioner plead guilty to both of the 1970 charges. He does not contend that these pleas were not made voluntarily with full understanding of the nature of the charges and the consequences of the pleas. A plea of guilty has the effect of admitting all material facts alleged in the charge. *Kahl* v. *United States*, 204 F.2d 864 (CA10 1953). When the petitioner intelligently and voluntarily entered his pleas of guilty on January 26, 1970, in Cases Numbered CRF-69-2754 and CRF-69-2832, one of the elements for each offense

which he admitted was the fact of a valid prior conviction. A plea of guilty is a waiver of all non-jurisdictional defenses. *United States* v. *Soltow*, 444 F.2d 509 (CA10 1971); *Atkins* v. *State of Kansas*, 386 F.2d 819 (CA10 1967); *Mahler* v. *United States*, 333 F.2d 472 (CA 10 1964), cert. denied 379 U.S. 993. The Supreme Court has declared that:

> "The plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial. . . ." *Brady* v. *United States*, 397 U.S. 742, 748 (1970).

Directly in point on the issue of the effect of a guilty plea to an enhancement charge is *Zales* v. *Henderson*, 433 F.2d 20 (CA5 1970) wherein the court persuasively reasons:

> "[1, 2] A guilty plea 'differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required: the court has nothing to do but give judgment and sentence.' Kercheval v. United States, 1927, 274 U.S. 220, 223, 47 S.Ct. 582, 583, 71 L.Ed. 1009, 1012. And in the leading exposition of this Court on the effect of a guilty plea, we stated:
>
> 'It is settled by a host of authorities that a judgment on a plea of guilty which has been entered voluntarily on advice of counsel is not rendered invalid because the defendant had previously made a confession under circumstances which might have rendered it inadmissible in evidence if the defendant had pleaded not guilty and had gone to trial. This is so because the plea, if voluntarily and understandingly made, is conclusive as to the defendant's guilt, admitting all the facts charged and waiving all non-jurisdictional defects in the prior proceedings against him. The judgment and sentence which follow a plea of guilty are based solely upon the plea. . . .'

Busby v. Holman, 5 Cir., 1966, 356 F.2d 75, 77-78. Guided by *Busby* we have often enumerated the kinds of defects that a defendant waives when he pleads guilty. See, e.g., Brown v. Beto, 5 Cir., 1967, 377 F.2d 950 (illegal confession plus no counsel when it was taken); Hamilton v. Florida 5 Cir., 1968, 390 F.2d 872 (illegal detainment, incompetent counsel, warrantless arrest); Askew v. Alabama, 5 Cir., 1968, 398 F.2d 825 (denial of the right to counsel and to confront witnesses at a preliminary hearing); White v. Beto, 5 Cir., 1968, 399 F.2d 302 (conviction based on insufficient evidence); Chandler, note 7, supra (denial of preliminary hearing); Todd v. United States, 5 Cir., 1969, 418 F.2d 134 (defense of insanity); Frye v. United States, 5 Cir., 1969, 411 F.2d 562 (alibi defense): Rice v. United States 5 Cir., 1969, 420 F.2d 863 (denial of bail, wrong offense in indictment).

[3] Thus it is Zales' guilty plea at the habitual offender hearing that separates his case from *Burgett*. Zales waived any complaints he may have had concerning the former offenses which were set out in the enhancement charge. On the other hand, had the plea been not guilty, it would have put in issue all matters going to the validity of the prior convictions including the presence of counsel at the previous trials. If Zales had proved that no counsel had been present he then could have been possibly the first to argue the retroactivity of *Gideon*. Or Zales could have raised the *Burgett* question before Burgett did.

The information of the prosecutor clearly accused Zales of four felonies. His plea admitted those acts. He now seeks to show that his convictions for those acts are invalid for lack of counsel. But the Supreme Court has answered:

> 'We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought. . . .'
>
> *Brady, supra*, 397 U.S. at 757, 90 S.Ct. at 1474." (Footnotes omitted). 433 F.2d at 23 and 24.

A court is not required to consider a petitioner's challenge to his former convictions if he has voluntarily and knowingly plead guilty to the enhancement charge. *Price* v. *Beto*, 436 F.2d 1070 (CA5 1971).

We must conclude that convictions now under attack do not bear a positive relation to petitioner's present confinement so that if they were set aside his current sentences would be shortened or terminated. Accordingly, when his petition was filed, the petitioner was not "in custody", either literally or by expanded definition thereof, pursuant to the court's judgments which are challenged by this proceeding. Therefore, this court does not have jurisdiction.

V. RECOMMENDATION

Petition for Writ of Habeas Corpus should be dismissed.

Dated this 28 day of March, 1973.

s/ Charles R. Jones

UNITED STATES MAGISTRATE

CERTIFICATE OF MAILING

This is to certify that I mailed three printed copies of the instrument to which this certification is attached to the following named persons, this ..... day of October, 1974:

Howard E. Mason
Reg. No. 82563
P. O. Box 97
McAlester, Oklahoma 74501

William R. Montgomery
Attorney at Law
720 Kipling, Suite 14
Lakewood, Colorado 80215

Robert McDonald

OCT 17 1974

MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-384

ROY SPRINKLE, Acting Warden, Oklahoma State Penitentiary, and THE STATE OF OKLAHOMA,
Petitioners,

VERSUS

HOWARD E. MASON,
Respondent.

SUPPLEMENT TO APPENDIX

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Counsel for Petitioners

of Counsel:

KAY KAREN KENNEDY
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October, 1974

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

APPENDIX C

FILED
JAN 24 1974
Howard K. Phillips
Clerk, United States
Court of Appeals
Tenth Circuit

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY TERM, 1974

HOWARD E. MASON, PETITIONER-Appellant,	)	
v.	)	No. 73-1331
PARK J. ANDERSON, Warden, Oklahoma State Penitentiary, and/or STATE OF OKLAHOMA, RESPONDENT-Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D. C. 72-769)

Appellant filed a memorandum in opposition to summary affirmance pro se.

Before LEWIS, Chief Judge, PICKETT and SETH, Circuit Judges.

PER CURIAM

Appellant pleaded guilty in February 1965 to charges of second degree forgery and illegal possession of narcotics.

He was sentenced to concurrent five-year terms of imprisonment and was released on parole on December 15, 1967. On January 26, 1970, appellant pleaded guilty to charges of second degree burglary "AFCF" (after former conviction of a felony) and obtaining a thing of value by bogus check "AFCF." He was sentenced to concurrent fifteen-year terms of imprisonment. All of these events took place before the Oklahoma state courts.

He then, after unsuccessfully trying to raise the issue by way of state postconviction relief, brought this action in the United States District Court challenging his 1965 convictions essentially on the ground that he was without counsel at the time he entered his plea of guilty and that such pleas were not freely and voluntarily given. While the appellant, in his "Memorandum Brief in Support of Petition for Writ of Habeas Corpus," stated that "[t]he present judgment and sentence is not under attack in this action," and in his Traverse reiterated this contention and stated that he did not "ask [the District] Court to in any way modify his present sentence, only to apply time served on an illegal sentence [for the prior 1965 conviction] to his present sentence . . . ," it is nevertheless clear that his basic assertion *is* that the second sentence, predicated upon a prior conviction, is invalid because the prior conviction and plea were tainted by the absence of counsel and the lack of free and voluntary consent. This is amply evidenced by appellant's reliance upon our holding in Oswald v. Crouse, 420 F.2d 373 (10th Cir.), and, in turn, the Supreme Court's decision in Burgett v. Texas, 389 U.S. 109, 115 (1967).

That the appellant became sidetracked on what appears to be a valid claim under Oswald v. Crouse, in predicating part of his petition on the assertion that because the prior conviction was invalid and he served time therefor he should have his prior time credited to the second sentence, does not change his basic ground for and in the petition.

He did contend, and does so now, that had the prior conviction not been used to enhance punishment in the second conviction, he would, under Oklahoma law, have been subject to a sentence of from two to seven years rather than the one of from ten years to life under which he is presently incarcerated.

By way of affidavit, the court reporter who was present at the 1965 hearing in which appellant pleaded guilty stated that "no notes were taken at the time of the guilty pleas; and, therefor, there are no notes available for transcription." The "Judgment and Sentence on Plea of Guilty" forms for the two 1965 convictions do state that the appellant was "duly represented at all appearances before the court by his attorney of record." Likewise, the docket sheets for these two convictions state that, at the time appellant entered his pleas of guilty, he was represented by counsel. These representations, however, are simply court forms and stamps which have been filled in by someone. They are entitled to due consideration and weight. They are, on the other hand, not signed either by the appellant or by his supposed counsel. As we stated in Oswald v. Crouse, 420 F.2d at 374, they do not "affirmatively disclose, however, that any one attorney in fact represented [the appellant] . . . The record is, in short, indefinite and inconclusive as to whether [the appellant] was himself represented at the time of his plea. An ambiguous and inconclusive record is tantamount to a silent one, from which we may presume neither the presence of counsel nor the waiver thereof."

As we recently emphasized in Beavers v. Anderson, 474 F.2d 1114, 1117 (10th Cir.), where allegations of coercion are made, there is raised some uncertainty as to the voluntariness of the plea and further inquiry is indicated. And further, as there said, "the use of a form by itself will not be sufficient in every case and will need an elaboration in some instances."

Appellant was "in custody," 28 U.S.C. § 2254, at least in part as the result of his 1965 pleas and convictions, and this, under a liberal reading of the requirement, see Hensley v. Municipal Court, 411 U.S. 345 (1973), is sufficient to confer jurisdiction on the district court.

The state court records before us do not unambiguously and conclusively show that at the time appellant pleaded guilty in 1965 he either was represented by counsel or knowingly and voluntarily entered these pleas, thereby waiving his right to a jury trial. We of course express no opinion on the merits of appellant's contentions; nor do we decide what remedy is available. Nor do we express on the record before us an opinion on the effect of the guilty pleas entered in 1970 on the use of the 1965 convictions.

In view of the foregoing, an evidentiary hearing is necessary to determine the validity of the 1965 convictions, Oswald v. Crouse, 420 F.2d at 373, and to decide the other indicated issues.

Accordingly, the judgment of the district court is vacated and the cause remanded for further consideration consistent with the views expressed herein.

APPENDIX D

JANUARY TERM—MARCH 8, 1974

Before Honorable David T. Lewis, Chief Judge, Honorable John C. Pickett, Senior Circuit Judge, and Honorable Oliver Seth, Circuit Judge

HOWARD E. MASON,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	No. 73-1331
	)	
PARK J. ANDERSON, Warden, Oklahoma State Penitentiary, and/or STATE OF OKLAHOMA,	)	
	)	
Respondent-Appellee,	)	

This matter comes on for consideration of appellee's petition for rehearing and memorandum brief in support of the petition for rehearing.

Upon consideration whereof, the opinion of this Court filed on January 24, 1974, is withdrawn. The judgment heretofore entered on January 24, 1974, is vacated.

It is the further order of the Court that appellee's petition for rehearing is granted and the case is assigned to Calendar B pursuant to Rule 9(b) of the Rules of Court, for briefing. The appellant's brief will be due March 29, 1974, and the appellee's brief will be due within 21 days after the filing of appellant's brief.

It is further ordered that William R. Montgomery is appointed under 18 U.S.C. § 3006A(g) to represent the appellant with a maximum of $250.00 compensation.

This order of Court is entered effective February 27, 1974, nunc pro tunc.

s/ Howard K. Phillips

t /HOWARD K. PHILLIPS
Clerk

CERTIFICATE OF MAILING

This is to certify that I mailed three printed copies of the instrument to which this certification is attached to the following named persons, this ..... day of October, 1974:

Howard E. Mason
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.....
Robert McDonald